FOR ARGUMENT

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1734

ROBERT PARRATT and
FRANCIS LUGENBILL,

Petitioners,

v.

BERT TAYLOR, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S REPLY TO PETITIONERS' OPPOSITION TO MOTION TO DISMISS THE WRIT OF CERTIORARI

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INTRODUCTION

On October 20, 1980, this Court granted a Writ of Certiorari. At the time the Writ was granted the controversy existing between the parties was for $23.50. This amount, the respondent alleged, was owed to him by the petitioners because their negligence caused him to lose property valued at that amount while he was incarcerated at the Nebraska Penal and Correctional Complex.

After the granting of the Writ, respondent accepted an offer from a third party (a religious organization) for payment of the entire amount in controversy. Respondent has signed an affidavit acknowledging such payment. He has also issued a release in favor of the petitioners for any and all claims or causes of action he might have arising out of the stolen or lost property. One of the primary reasons that the respondent accepted payment is that, because he has moved to the State of Washington and because of the communication problems that entails, he has lost interest in the prosecution of the suit.

ARGUMENT

I.

THIS CASE SHOULD BE DISMISSED BECAUSE THIS CASE IS MOOT, SINCE THERE IS NO CASE OR CONTROVERSY PRESENTED BY IT.

Article III, Section 2, Clause 1, of the United States Constitution establishes as a prerequisite to Federal jurisdiction in a litigated case, the existence of a "case or controversy." Id. This Court has interpreted this to mean that "federal Courts are without power to decide questions that cannot affect the rights of litigants in the case before them." DeFunis v. Odegaard, 416 U.S. 312, 316 (1974), (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971)). More specifically, in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, reh. den. 300 U.S. 687 (1937), the Court stated that a case to be susceptible to Federal jurisdiction:

> . . . must be definite and concrete, touching the legal relations of the parties having adverse legal interests . . . . It must be a

> real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Id. at 240-241.

It is from this requirement that the doctrine of mootness is derived. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." County of L.A. v. Davis, _____ U.S. _____, 99 S.Ct. 1379, 1383 (1979), (quoting Powell v. McCormack, 395 U.S. 489, 496 (1969)). Mootness can occur because "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Id. at _____, 99 S.Ct. at 1379 (emphasis added). "The usual rule in federal cases is . . . that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." Roe v. Wade, 410 U.S. 113, 125 (1973).

The facts presented in DeFunis v. Odegaard, 416 U.S. 312 (1974), offer an illustration of interim relief or events causing a case to become moot. The appellant DeFunis was denied admission to the law school of the University of Washington. He brought suit in a Washington trial court alleging that the procedures and criteria employed by the law school discriminated against him on account of his race, in violation of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. Id. at 314. He sought a mandatory injunction commanding the University to admit him as a member of the first-year class. Id. The trial court found in his favor and he was admitted to law school on order of the court. Id. at 314-15. The Washington Supreme Court reversed the trial court, and Writ of Certiorari was granted by the United States Supreme Court. Id. At the time of oral argument DeFunis was in his last semester of law school. Id. at 315. The University indicated that it would allow DeFunis to complete law school, even if the Supreme Court affirmed the decision of the

Washington Supreme Court. Id. at 316. The United States Supreme Court thus held that the case was moot, since "[a] determination by this court of the legal issues tendered by the parties is no longer necessary to compel that result [the completion of law school] and it could not serve to prevent it." Id. at 317.

Another example is Sosna v. Iowa, 419 U.S. 393 (1975). In Sosna, the appellant challenged the constitutionality of Iowa's one year residency requirement for divorce. Id. at 395-96. At the time of oral argument before the Supreme Court, the appellant had satisfied the one year residency requirement, and had obtained a divorce outside of Iowa. Id. at 399. The Court in dicta stated that had appellant sued on her own behalf, the case would be moot and require dismissal. The Court was able to hear the case, however, because the case had been filed as a certified class action, Id. at 397, and although the action was moot as far as the class representative was concerned, it was not moot as far as the class itself was concerned. Id. at 399.

In this case the intervening facts that have caused it to become moot are that the amount in controversy has been paid in full to the respondent by a third party and the respondent has executed a release for any and claims and causes of action he might have arising out of the situation which is the basis of his original claim. Similar to the situation presented in DeFunis, a determination by this Court is no longer necessary to compel the payment of the amount in controversy, or to prevent it. The controversy is no longer "live." The parties lack "a legally cognizable interest in the outcome."

That the intervening events or facts that make a controversy moot can be brought by the plaintiff has long been accepted by the United States Supreme Court. Heitmuller v. Stokes, 256 U.S. 359 (1921). In Heitmuller, the plaintiff originally brought suit in the Supreme Court of the District of Columbia to recover from the defendant possession

of land located in Washington. The Washington Supreme Court found in favor of the plaintiff. The decision was affirmed by the Court of Appeals for the District of Columbia. Id. at 360. The United States Supreme Court granted a writ of error. Id. However, before the case could be heard, the plaintiff sold his entire interest in the property. The Court held that this made the issue moot, for the plaintiff had "no further interest in the case . . . except to recover costs and rental due because of the wrongful detention of the property." Id. at 361.

Another case illustrative of the point that subsequent actions of a plaintiff may make an action moot is the Fifth Circuit case, Troy State U. v. Dickey, 402 F.2d 515 (5th Cir. 1968). Dickey, a former student newspaper editor, sued Troy State University when the University denied him readmission after he had been expelled for refusing to follow a faculty advisor's instructions to publish a certain editorial, but instead published his own article. Id. at 516. Dickey challenged the action of the University on the ground that the denial of his readmittance violated his First Amendment right of free speech. Id. After the Writ of Certiorari was granted, Dickey filed an affidavit with the Court stating that he did not plan to re-enter the University to complete his undergraduate degree. Id. Despite both parties urging to decide the case on the merits, "notwithstanding that the only relief sought by Dickey was to require the University Trustees to re-enroll him at Troy State, relief which he now does not seek," the Court held that the issue was moot, and remanded it for dismissal. Id. The Court stated that the case was moot for "there is no longer a subject matter upon which the judgment of this court can operate." Id.

Another somewhat analogous situation in which this Court has recognized that actions taken by a plaintiff subsequent to the granting of Writ of Certiorari may make a case moot, are the settlement cases. In Verret v. Oil Transport Co., Inc., 365 U.S. 768 (1960), and J. Aron & Co.

v. Mississippi Shipping Co., 361 U.S. 115 (1959), this Court held that consent judgment entered by the lower Court subsequent to the filing and granting of the petition for Writ of Certiorari makes a case moot.

II.

THIS CASE SHOULD BE DISMISSED BECAUSE THIS CASE IS MOOT, AND IT DOES NOT FALL WITHIN THE "CAPABLE OF REPETITION, YET EVADING REVIEW" EXCEPTION.

As the petitioners have noted in their brief, this Court in Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911), for the first time recognized an exception to the mootness doctrine. This Court held that a case, although moot, may be entitled to review on the merits if the issue presented by the case is "capable of repetition, yet evading review." Id. at 515, Petitioner's brief at 3. In Sosna v. Iowa, 419 U.S. 393 (1975), the Supreme Court, in the absence of a class action, limited the "capable of repetition, yet evading review" exception to situations in which the following two elements were present:

1. The challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and

2. There was a reasonable expectation that the same complaining party would be subjected to the same action again.

Weinstein v. Bradford, 423 U.S. 147, 149 (1975), (citing Sosna v. Iowa, 419 U.S. 393 (1975).

Application of these limitations is illustrated in Weinstein v. Bradford, 423 U.S. 147 (1975). The facts of that case were that the plaintiff, Bradford, sued members of the North Carolina Parole Board, alleging that he was entitled under the Fourteenth Amendment of the Constitution to certain procedural rights when his eligibility for parole was considered, and that he had been denied these rights. Id. at 147. The Court held that the case was moot when it found that after its grant of writ, but prior to its handing down its decision, Bradford had been completely released from supervision, and thus "from that date forward it is

plain that respondent can have no interest whatever in the procedures followed by petitioners in granting parole." Id. at 148. The Court rejected the petitioners' (the Board's) argument that the case was not moot because the issue presented by it "is capable of repetition, yet evading review." The Court's rejection was based on its finding that there was no reasonable expectation that the respondent would be subjected to the same action again. The Court stated that: "While petitioners will continue to administer the North Carolina Parole System with respect to those who at any given moment are subject to their jurisdiction, there is no demonstrated probability that respondent will again be among that number." Id. at 149.

Another illustration is presented in DeFunis v. Odegaard, 416 U.S. 312 (1974). In that case, the Court held that a question "capable of repetition, yet evading review" was not presented by the facts of the case. This holding was based on the Court's finding that DeFunis "will never again be required to run the gauntlet of the Law Schools' admissions process, and so the question is certainly not 'capable of repetition' so far as he is concerned." Id. at 319 (emphasis added). Additionally, the Court stated "just because this particular case did not reach the Court until the eve of the petitioner's graduation from law school, it hardly follows that the issue he raises will in the future evade review. If the admissions procedures of the law school remain unchanged, there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court . . . ." Id.

In applying the two-pronged limitation to the facts presented in this case, it is apparent that the "capable of repetition, yet evading review" doctrine is inapplicable. Respondent is no longer residing in the State of Nebraska. He has moved to the State of Washington. This is one of the reasons he was interested in accepting the payment of the amount in controversy and terminating the issue. Since he

no longer resides in Nebraska it is not demonstrable that respondent will be subjected to the same action again.

Additionally, as in DeFunis, although there is no reason to suppose that respondent will be subject to the same action again, this does not mean that in the future the issues he raised will evade the Court. The petitioners themselves indicate in their brief that "[i]ncluding this case, writs of certiorari have been granted on the negligence issue raised by this case three times in the last three years." Id. at 3.

III.

THIS CASE SHOULD BE DISMISSED BECAUSE THIS CASE IS MOOT, AND IT DOES NOT FALL WITHIN THE "CLASS ACTION" EXCEPTION.

The petitioners argue that the action brought in this case is a constructive class action, and although the case may be moot to the representative of the class, it is not moot to the class as a whole, and thus the Court may exercise jurisdiction and decide the case on its merits. Sosna v. Iowa, 419 U.S. 393 (1974); Roe v. Wade, 410 U.S. 113 (1973); Petitioner's Brief at 4. This reasoning, however, completely ignores Federal Rule of Civil Procedure 23, Class Actions. This case was never duly certified as a class action pursuant to that rule. The necessity that Rule 23 be followed in order to avoid the doctrine of mootness because a class action is involved is illustrated in this Court's decision of Board of School Comm'r. v. Jacobs, 420 U.S. 128 (1975).

In that case, the original action was brought in Federal District Court by six named plaintiffs seeking to have declared unconstitutional regulations and rules promulgated by the Commissioners, and to the enforcement of those regulations and rules enjoined. Id. at 128. At the time the action was brought, all six plaintiffs were high school students attending schools managed by the Board of School Commissioners. Id. at 129. By the time certiorari was granted, and oral argument was heard, all six plaintiffs had graduated from the school system. Id. The Court stated

that the case would not be moot if it was duly certified as a class action pursuant to Federal Rule of Civil Procedure 23, and (1) "a controversy still exists between petitioners and the present members of the class," Id., and (2) "the issue in controversy is such that it is capable of repetition yet evading review." Id.

The Court held that the case was moot because the parties had inadequately complied with Rule 23(c); "no other effort was made to identify the class or to certify the class action." Id. The Court stated that "[t]he need for definition of the class purported to be represented by the named plaintiffs is especially important in cases like this one where the litigation is likely to become moot as the initially named plaintiffs prior to the exhaustion of appellate review." Id. at 30.

Similarly, in Pasadena City Bd. of Education v. Spangler, 427 U.S. 424 (1976), the Court held that in a school segregation case in the United States Supreme Court, where all the plaintiffs have graduated from the School System, the case becomes moot where there has been no certification of any class action under Rule 23. Id. at 430. This holding was made although the suit was filed as a class action and was treated as a class action by the parties thereto. Id.

IV.

THIS CASE SHOULD NOT BE DECIDED ON THE MERITS BY THIS COURT SIMPLY BECAUSE THERE IS A NEED TO RESOLVE SIGNIFICANT QUESTIONS, BECAUSE SUCH A DECISION WOULD VIOLATE ARTICLE III OF THE UNITED STATES CONSTITUTION.

An additional argument made by the petitioners in their brief is that even if the issue is moot, the Court may in its discretion decide the issue if there are strong policy reasons for it to do so. Petitioners' Brief at 5. This Court in Richardson v. Ramirez, 418 U.S. 24 (1974), however, stated that "while the Supreme Court of California may choose to adjudicate a controversy simply because of its public importance, and the desirability of a state-wide

decision, we are limited by the case-or-controversy requirement of Article III to adjudication of actual disputes between adverse parties." Id. at 36. The two recognized exceptions to the mootness doctrine do not, by their operation, take the Court outside the Constitution, because a case and controversy continue to exist between the parties involved.

The rationale behind the class action exception is that although "the controversy is no longer live as to [the named representative] it remains very much alive for the class of persons [the representative] has been certified to represent." Sosna v. Iowa, 419 U.S. 393, 401. Similarly, the rationale behind the other recognized exception to the mootness doctrine, "capable of repetition, yet evading review," is that there is a reasonable expectation that the same complaining party would be subjected to the same action again." Weinstein v. Brandford, 423 U.S. 147, 149 (1975).

If the Court is given discretion to decide cases which are moot to all parties involved, presently and in the future, such as presented in this case, the Court would be going outside the limitation mandated by the United States Constitution. This Court has repeatedly stated that to constitute a "case or controversy" there must be an actual controversy over an issue, not a desire for an abstract declaration of law." In Re Summers, 325 U.S. 561 (1954); Svbron v. New York, 392 U.S. 401, 50 n. 8 (1965).

CONCLUSION

For the reasons above, we urge this Court to grant respondent's motion to dismiss this case as moot.

Respectfully submitted,

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